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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

Progress report on the question of the impunity of perpetrators of violations of human rights (civil and political rights), prepared by Mr. Joinet, pursuant to Subcommission resolution 1994/34

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INTRODUCTION

1. The present progress report is a little different in presentation from the normal format, since the traditional method of drafting, which consists in proposing an amended version of the preliminary report, does not enable the reader to visualize clearly what is new and what changes of direction are proposed. It therefore seemed preferable to produce a report which, in the light of existing suggestions, highlighted the points still needing discussion. The Special Rapporteur has in fact received some interesting suggestions, not only from non-governmental organizations, which joined together to facilitate consultations (the Special Rapporteur met them on five separate occasions), but also from Governments which kindly sent him their comments. All of them are to be thanked.

2. To acquaint the reader better with the state of progress of the study, it seems worthwhile to recapitulate briefly, in chronological order, the action taken by the Subcommission at its recent sessions, since they constitute the background to the present progress report.

(a) Forty-third session, August 1991:

Subcommission decision 1991/110 requesting two of its members (Mr. El Hadji Guissé and Mr. Louis Joinet) to draft a working paper.

(b) Forty-fourth session, August 1992:

Presentation of the working paper (E/CN.4/Sub.2/1992/18);

Resolution 1992/23 deciding to request the co-authors to draft "a study on the impunity of perpetrators of violations of human rights";

Note verbale of 10 December 1992 asking for information on this subject;

The Commission on Human Rights (in resolution 1993/43) and the Economic and Social Council (in decision 1993/266) successively approved the action taken by the Subcommission.

(c) Forty-fifth session, August 1993:

Presentation of the preliminary report (E/CN.4/Sub.2/1993/6), described in error as a "progress" report;

Resolution 1993/37 welcoming the preliminary report and requesting the Special Rapporteurs to extend their study to serious violations of economic, social and cultural rights.

(d) Forty-sixth session, August 1994:

Presentation of the preliminary report (E/CN.4/Sub.2/1994/11) extending the study to economic, social and cultural rights;

Subcommission resolution 1994/34 welcoming with satisfaction the above-mentioned preliminary report. However, on account of the difficulties experienced by the two co-authors in maintaining contact with each other, owing to distance, but mainly because of the complexity of the dual approach to the subject, the Subcommission decided to split the study in two. It entrusted Mr. Louis Joinet with the completion of the first aspect (civil and political rights) and requested Mr. El Hadji Guissé to complete the study of the second aspect (economic, social and cultural rights).

3. Pursuant to resolution 1994/34, the present progress report is submitted to the Subcommission for consideration at its present session. The Subcommission's attention is drawn particularly to the following points, with a view to the presentation of the final report in 1996.

I. POINTS UNDER DISCUSSION CONCERNING THE SCOPE OF IMPUNITY AND IN PARTICULAR ITS DEFINITION

4. A number of non-governmental organizations have expressed the wish for a definition of the concept of impunity to be provided which would encompass all the measures and practices whereby, on the one hand, States fail in their obligation to investigate, try and sentence those responsible for violations of human rights and, on the other hand, they impede the effective enjoyment by victims and their families of the right to know the truth and to have their rights restored.

5. There is a close nexus between the issues associated with the right to reparation and those associated with action to combat impunity. Having considered the matter and consulted with Mr. Theo van Boven, Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, the present Special Rapporteur proposes that, rather than impunity being defined in legal terms, the procedure should be to delimit the scope of action taken to eradicate and prevent impunity, particularly with reference to the violations referred to by Mr. Theo van Boven in his study (E/CN.4/Sub.2/1993/8). Our present thinking is that the scope of this action should basically cover violations of a serious and massive nature or constituting a systematic practice. Cases lying outside the scope of the study would be those of impunity following reprehensible conduct which is isolated or non-premeditated.

6. It will be recalled that a previous report (E/CN.4/Sub.2/1993/6) stated that only violations committed by the State or its agents, or by individuals acting on their orders or with their connivance, fell within the scope of the study. This point deserves discussion in the Subcommission in order to see whether the study should be extended to violations committed by non-State groups, as implied in some statements made by representatives of Governments

to the Commission on Human Rights. Two arguments are advanced in this respect: first, in a situation of civil war the virtual absence of the State - or its disintegration - encourages the committing of atrocities or acts of barbarity which are not all of State origin; secondly, in certain armed struggles, serious crimes and violations may be committed by non-State groups (national liberation movements, guerrillas, etc.), and also the question arises in specific terms when a peace agreement emerges and negotiations concern, among other things, a possible amnesty. In this light, it would be valuable to analyse the observations made by non-governmental organizations and Governments in order to determine whether the study should be extended to violations committed by such groups.

II. THE FOCUS OF DEVELOPMENTS CONCERNING THE ROLE OF CIVIL SOCIETY IN COMBATING IMPUNITY

A. Capacity of victims to organize themselves and to secure reparation

7. The preliminary report (E/CN.4/Sub.2/1993/6) gave prominence to impunity affecting victims considered as individuals, which leads them to band together, especially in the form of non-governmental organizations (NGOs), in order to mobilize opinion. But, it was indicated, impunity can also affect groups as such, and even an entire society. Further consideration should therefore be given to the conditions in which, where violations are massive or affect entire groups, a collective mode of reparation should be substituted for individual and direct compensation of the victims. The notion of a collective victim, or rather of a collective right to reparation, should therefore be the subject of detailed examination.

8. With this in mind, it is proposed that consideration should be given firstly to that part of the above-mentioned study by Mr. Theo van Boven (E/CN.4/Sub.2/1993/8) entitled "Individuals and collectivities as victims" (paras. 14 and 15), as well as chapter VII, "The issue of impunity in relation to the right of reparation for victims of gross violations of human rights", and chapter IX, "Proposed basic principles and guidelines", especially General Principle 7. Secondly, attention should also be directed to the report prepared by the Secretary-General pursuant to Subcommission resolution 1993/29 (E/CN.4/Sub.2/1994/7 and Add.1), and the report of its sessional working group on the administration of justice and the question of compensation (E/CN.4/Sub.2/1994/22).

9. In addition, it would be interesting to examine further the importance of the role of victims' organizations through case-studies relating to Latin America (as exemplified by the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM)) and Eastern Europe, in view of their specific roles. Any information relating to other victims' organizations playing a significant part in such developments would also be welcome.

B. Need to improve the effectiveness of United Nations mechanisms for the protection of human rights

10. Several NGOs have drawn attention to the disappointment felt by organizations of victims and their families at the ineffectiveness in combating impunity of certain United Nations mechanisms for the protection of human rights. This criticism relates largely to the complexity of their procedures (an example is the procedure laid down in Economic and Social Council resolution 1503 (XLVIII)) and their slowness, as well as to the political "connivance" which results in violations of human rights in some countries being dealt with inadequately or on a selective basis. In certain cases, according to these NGOs, the shortcomings are such as to create a situation in which the United Nations is in danger of contributing to impunity. Proposals should be made on this matter, in consultation with those responsible for the treaty mechanisms and special procedures concerned.

III. CLARIFICATION OF STATES' RESPONSIBILITY IN COMBATING IMPUNITY

A. Dangers inherent in the notion of relative impunity

11. In paragraph 104 of the preliminary report (E/CN.4/Sub.2/1993/6), an attempt was made to examine the notion of "relative impunity" put forward by Mr. van Boven in his study on the right to reparation for victims (E/CN.4/Sub.2/1992/8, para. 3). This notion took into consideration both the illegitimacy of "absolute impunity" as well as the fact that in practice it is impossible to try without exception every single person responsible for serious violations of human rights.

12. Several NGOs have expressed their disagreement with this approach, indicating that it involves the risk of indirectly legitimizing impunity. The opinion of the Subcommission would be of value in this regard.

B. Obligations of States under international law

13. In addition to the obligations mentioned in the preliminary report (paras. 46-59), the Special Rapporteur proposes including among the obligations contracted by States a number of relevant provisions from regional conventions relating to human rights (the American Convention on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples' Rights). The work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind should also be reflected, as well as work on the proposed basic principles and guidelines of the Special Rapporteur on the right to reparation for victims (E/CN.4/Sub.2/1993/8, para. 137), including General Principle 5. According to that principle, impunity conflicts with the duty to prosecute and punish the perpetrators of gross violations of human rights which is inherent in the entitlement of victims to obtain from the State not only material reparation but also satisfaction of the "right to know" or, more precisely, the "right to the truth". This last point is also worthy of further examination.

14. The Special Rapporteur wishes in addition to take greater account of the important contribution at the international level of the jurisprudence of the

jurisdictional (or parajurisdictional) bodies competent in the area of human rights, such as the Human Rights Committee or, at the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, among others, because of the originality of their jurisprudence concerning the obligation placed on States to investigate and prosecute perpetrators of violations of human rights.

15. Finally, some thought should be given to the relevance of the general principles of law and custom to the obligations incumbent upon States to combat impunity. Of particular pertinence are the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Economic and Social Council resolution 1989/65 of 24 May 1989, annex) and the Declaration on the Protection of All Persons from Enforced Disappearance (art. 13).

C. Value of a comparative study of experience acquired by (extrajudicial) fact-finding commissions

16. Do (extrajudicial) commissions of inquiry represent progress in combating impunity? Being entrusted with seeking the truth rather than justice, they have the merit of revealing the mechanics of a system of violation of human rights, among other things by identifying the entities and authorities involved, reconstructing their role and preserving the evidence. However, these commissions can contribute to a certain form of impunity where their mandate, if imprecise, encourages manipulation or where they substitute themselves outright for justice. A most useful task would be to formulate guidelines for these extrajudicial commission of inquiry (composition, mandate, duration, procedure, working methods, etc). The work could be undertaken on the basis of a comparative study of experience acquired by commissions of inquiry.

D. Military and other courts of special jurisdiction

17. In confirmation of the preliminary report, most Special Rapporteurs point to the extent to which military courts can be a factor in impunity. In the light of studies conducted by the relevant United Nations bodies and by the regional (European, American and African) systems for the protection of human rights, and the positions they have adopted, consideration should be given to measures in this respect that would make the combating of impunity as effective as possible. Should military courts be retained, with their competence limited to purely military offences committed solely by the military? But would that not legitimize the principle of the existence of such courts? Another restrictive option is: should they be retained for wartime use only? A third and more radical option, based on the experience of abolitionist countries, is: should the call be to suppress them altogether? For is it not arguable that the characteristic rules governing these courts (on composition, competence and procedure) bring them into conflict with article 14 of the International Covenant on Civil and Political Rights; among other criteria, this article requires the presence of competent, independent and impartial judges, a difficult claim to make for bodies in which the military remain subject to their superiors, even supposing (although there is no known precedent) that all the other safeguards established by article 14 are respected.

E. Principle of due obedience and mitigating circumstances

18. The principle of due obedience is indisputably a factor in impunity which can lead to perennial violations of human rights. In referring to the relevant work and instruments of the United Nations in this field (the work of the International Law Commission at its thirty-eighth session; article 6, paragraph 1, of the Declaration on the Protection of All Persons from Enforced Disappearance; article 2, paragraph 3, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), several NGOs made the point that the duty of obedience, in other words carrying out the order of a superior, could not be interpreted as exonerating the subordinate from criminal responsibility, even though in certain situations it may be said to constitute a mitigating circumstance. The scope of mitigating circumstances in regard to due obedience should therefore be clarified in order to narrow its negative implications for the elimination of impunity.

F. Amnesty

19. The Special Rapporteur, after consulting numerous NGOs, intends to analyse the role of amnesty in greater depth. In the preliminary report, he emphasized the issues associated with amnesty in periods of transition (see chap. II, sect. C.3, entitled "The legal and political constraints of the processes entailed by reconciliation", paras. 102 et seq.). At the request of the NGOs, he envisages restructuring this section by picking out three situations: amnesty in normal times (examples being the Touvier and Barbie affairs in France); amnesty in a period of democratic transition (the example of Chile); and amnesty in peace agreements (the example of New Caledonia).

20. According to these NGOs, amnesty should be prohibited in all circumstances in which it constitutes an incentive to impunity. Reference is made in particular to the recommendations of the Working Group on Enforced or Involuntary Disappearances against amnesty, and to the Vienna Declaration and Programme of Action. ("States should abrogate legislation leading to impunity for those responsible for grave violations for human rights ... and prosecute such violations, thereby providing a firm basis for the rule of law"; (A/CONF.157/24 (Part I), sect. III, para. 60). The Special Rapporteur will consider the compatibility of these proposals along with the specific requirements of the situations of conflict referred to above in order to reach conclusions and make recommendations.

G. Purges

21. The Special Rapporteur proposes further consideration of questions associated with purges in regard to policies to combat impunity. To what extent can purges remain compatible with respect for human rights? Guidelines could be drawn up on the basis of a comparative analysis of purges that have accompanied certain periods of transition, both in terms of the ethics of the goal and the extent of the process, as well as in regard to its implementation and the guarantees which should be established, in conformity the with relevant international rules, in order that the cure is not worse than the disease and in particular that purges do not become "witch hunts".

H. An international criminal tribunal

22. Several NGOs expressed the wish that priority be given to the creation of a permanent international criminal tribunal. The Rapporteur will endeavour in the final report to give detailed consideration to the various possibilities which have been suggested, such as a permanent international tribunal established under a convention, ad hoc tribunals, the extension of the jurisdiction of existing bodies like the tribunal on the former Yugoslavia, and even the International Court of Justice. That could provide an opportunity to put the various complementary aspects of some of these proposals into perspective in order to arrive at a possible consensus.

CONCLUSION

23. These are the points upon which the Special Rapporteur wishes to know the opinion of the Subcommission in order to be in a position to present his final report at the forty-ninth session.

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